Supreme Court U.S.
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No. 02-271

In The
Supreme Court of the United States

DOW CHEMICAL COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE STATE OF LOUISIANA JOINED AT THE CERT. STAGE: ARKANSAS, MARYLAND, MINNESOTA, MISSOURI, AND MONTANA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. CLASS ACTION ABUSE POSES A SIGNIFICANT THREAT TO THE RIGHTS OF *AMICI*'S CITIZENS	5
II. DUE PROCESS GUARANTEES THE RIGHT OF COLLATERAL REVIEW OF ADEQUACY OF REPRESENTATION	9
A. ESTABLISHED PRINCIPLES OF *RES JUDICATA* AND FULL FAITH AND CREDIT PERMIT COLLATERAL REVIEW OF ADEQUACY OF REPRESENTATION	10
B. THE PROTECTION AFFORDED ABSENT CLASS MEMBERS BY CONTINUING TO AFFORD THE OPPORTUNITY OF COLLATERAL REVIEW OF ADEQUACY OUTWEIGHS ANY CONTRAVENING INTEREST IN ELIMINATING SUCH A REVIEW	14
1. THE INTERESTS AT STAKE ARE SIGNIFICANT	14
2. COLLATERAL REVIEW OF ADEQUACY OF REPRESENTATION SUBSTANTIALLY REDUCES AN OTHERWISE SIGNIFICANT LIKELIHOOD THAT ABSENT CLASS MEMBERS WILL BE ERRONEOUSLY DEPRIVED OF THEIR RIGHTS	15

TABLE OF CONTENTS – Continued

Page

3. THE STATES' PUBLIC INTEREST IN PRESERVING THEIR CITIZENS' RIGHTS TO BRING CLAIMS WHEN THEY ACCRUE FAVORS COLLATERAL REVIEW 18

4. ANY CONTRAVENING INTEREST IN FINALITY DOES NOT OUTWEIGH CLASS MEMBERS' RIGHTS TO A DAY IN COURT 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 7

Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931) 12

Connecticut v. Doehr, 501 U.S. 1 (1991) 14

Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F3d 792 (11th Cir. 1999) 8

Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) 16

Hansberry v. Lee, 311 U.S. 32 (1940) 4, 10

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 10

Martin v. Wilks, 490 U.S. 755 (1989) 11, 12, 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 2, 14

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) .. 12, 16

Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691 (1982) 4, 10

STATUTES

FED. RULES CIV. P. 23 ..... *passim*

OTHER AUTHORITIES

Alon Klement, *Who Should Guard The Guardians? A New Approach For Monitoring Class Action Lawyers,* 21 REV. LITIG. 25 ..... 7, 8

Barry Meier, *Plaintiffs in Business Cases Challenge Group Justice,* N.Y. Times, Feb. 18, 1997 8

TABLE OF AUTHORITIES – Continued

Page

18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4455 (Supp. 2002) 9

18A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4430 (2002) 12

Joe Stephens, *Coupons Create Case for Lawyers: Class Action 'Paper' Settlements Mean Little to Individual Plaintiffs*, Wash. Post, Nov. 14, 1999 at A1 8

John J. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343 8

MOORE'S FEDERAL PRACTICE § 130.07[3] (3d ed. 1997) 9

Pamela Sherrid, *Class Action Crumbs*, U.S. News & World Rep., March 25, 2002 at 24 8

Patrick Woolley, *The Availability Of Collateral Attack For Inadequate Representation In Class Suits*, 79 TEX. L. REV. 383 ..... 7, 13, 16

Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, Wall St. J., July 19, 1996 at A1 7

Susan P. Koniak and George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 8

INTEREST OF THE *AMICI*

This brief *amici curiae* is submitted by six States. Our purpose is to highlight for this Court the enormous importance to our federalist system of permitting collateral review of adequacy of representation determinations made in multistate class actions. *Amici* believe that the position urged by Petitioners here – that defendants' interest in finality outweighs absentees' interest in adequate representation – fundamentally misconstrues due process and vitiates the only device through which *amici* can shield their citizens from class action abuses in distant forums. According to Petitioners, a court assessing the *res judicata* effect of a class judgment must unquestioningly accept the conclusion of the original certifying court that the entire class received adequate representation, even if a more dispassionate or more careful review reveals that the certifying court was wrong. In other words, Petitioners contend that class members should be bound to a class judgment even under circumstances where they may clearly have not received due process. This position flatly contradicts this Court's consistent jurisprudence in the areas of *res judicata*, full faith and credit, personal jurisdiction, and due process.

In recent years, *amici*'s citizens have increasingly been deprived of their rights to pursue redress in their own states' courts as a result of their inclusion as absent members of sweeping nationwide and multistate class action settlements. While in many instances absentees have received adequate representation, unfortunately, abuses have frequently also been documented. The very structure of class actions as mass settlement vehicles can create incentives to give short shrift to the interests of absentees. These incentives and the potential for abuse

are greatly magnified in the context of cases, such as this one, where the class action purports to resolve claims for "future" injury.

Collateral review of adequacy of representation provides the only available tool for *amici* to ensure that their citizens will not be deprived of due process by a foreign court adjudicating their rights *in absentia*. *Amici* submit this brief in defense of their interest in retaining this tool for protecting the constitutionally-protected rights of their citizens.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of whether the due process clause ***accords a right of collateral review of adequacy of representation for absentee class members in response to a motion for dismissal of their claims on the basis of res judicata***. Whether relying upon settled principles of *res judicata*, the advisory committee's comments to Federal Rule 23 supporting such a review, or even the due process balancing test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), advocated by Petitioners, this Court should answer that question with a resounding affirmative. The threat that absent class members will be erroneously deprived of their rights always looms large in the class context, and that risk overwhelms any countervailing interest in finality. This balance is overwhelmingly skewed in favor of permitting

[1] *Amici* note that this brief was prepared with the assistance of Steve Baughman Jensen, an attorney in Dallas, Texas.

collateral review in cases, such as this one, where parties invoke a class judgment that purported to resolve then-unaccrued "future" claims.

The Agent Orange class action was settled in 1984 and purported to resolve all Agent Orange-related claims of Vietnam veterans, including those who might suffer injury in the future. At the time of the settlement, neither Daniel Stephenson nor Joe Isaacson, the Respondents, were eligible to receive any compensation from that settlement, as neither manifested any injury at the time. After all settlement funds were disbursed, in the late 1990's Respondents were diagnosed with rare cancers which have been associated with Agent Orange exposure by the National Academy of Sciences. JA 319-325. Upon learning of their cancers, Respondents sued Petitioners in separate actions that were later consolidated. Petitioners successfully moved to dismiss their claims on the ground that they were precluded by the 1984 class action judgment, even though neither Respondent was eligible at any time for compensation from that settlement. The Court of Appeals for the Second Circuit unanimously reversed, holding that due process had been violated, as neither Respondent had received adequate representation in the class action proceedings, while also indicating that they likely had not received adequate notice and a meaningful opportunity to opt out. The Second Circuit ruled that the class judgment was therefore not entitled to preclusive effect on Respondents' claims. Petitioners now assert that the Second Circuit should be reversed even if Respondents' due process rights have been violated, on the basis that no challenge to a finding of adequate representation made by a certifying court should ever be permitted in any other court, regardless of its merit.

Amici disagree with Petitioners contention that would remove any right of review by courts other than the certifying court, and, instead, believe that this Court should affirm the longstanding right of courts to conduct such a collateral review of whether due process has been denied to absent class plaintiffs. This Court has consistently held that judgments will only be entitled to preclusive effect when the court entering those judgments both had proper jurisdiction and provided full due process protection to the litigants. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982).

Adequate representation must have been afforded to absentees before a court may extend full faith and credit to a class judgment. Although federal Rule 23 and its state counterparts require that courts find that a putative class has been adequately represented as a prerequisite to certification, the risk is unacceptably high that such an initial finding of adequate representation may be wrong. In the class context, courts have a powerful incentive to conflate the issues of adequacy with the overall perceived fairness of any settlement. By the time of settlement, class counsel and the defendant often become aligned in their desire for court approval, and no structure exists to ensure full-blown adversarial presentation of the issue of adequacy. Recent trends demonstrate that certain courts are disturbingly likely to approve *any* proposed class action settlement. Often, such settlements have nationwide or multistate scope, so that many absent class members lack contacts with the forum and can neither afford to hire separate counsel nor travel to present their own objections. This is particularly true of "futures," who may not

have sufficient present damages to justify such expense. It is these citizens of *amici* who deserve the protection that is afforded by the ability to conduct a collateral attack in their own state's forum.

Indeed, the already unacceptable risk that a certifying court will make an erroneous finding of adequacy is magnified considerably in the future claimant context. When class actions purport to resolve claims that do not yet exist at the time of the settlement's approval, any initial adequacy review necessarily requires prediction of unknown events that creates an inherently alarming risk that many class members will unfairly be deprived of their as yet unaccrued rights. The facts of Respondents' cases illustrate this dramatically. How could Messrs. Isaacson and Stephenson have been adequately represented in a class action that extinguished their causes of action before they ever arose and without any compensation? They have not received the adequate representation guaranteed them by the Due Process Clause, and this Court should not permit Petitioners' illegitimate interests in premature finality to outweigh Respondents' right to a day in court.

ARGUMENT

I. Class Action Abuse Poses a Significant Threat to the Rights of *Amici*'s Citizens.

Amici urge this Court to recognize the reality that class litigation has at times resulted in serious abuses of class members' rights. Petitioners seek to blind the Court to that reality by pointing instead to the legal requirements for class certification. In theory, and when properly administered, those requirements should result in class

members receiving due process. However, the ongoing historical record demonstrates that class certification requirements alone have sometimes proven insufficient to protect absent class members, who, by the very nature of the class procedure, are highly vulnerable to exploitation.

Class action abuses in recent years have generated a frenzy of media attention, academic scholarship, and both legislative and judicial proposals for reform. *Amici* take no position here with respect to any proposed reform but merely ask this Court to recognize the critical need to maintain the check on abuse afforded by the availability of collateral review of adequacy of representation.

Class action abuse may take a number of forms, but the most notable are inadequate settlements and sweeping class definitions that encompass absent members from many states, without regard to differences in state law. The two abuses can go hand-in-hand. Individual class members with stronger legal claims almost invariably are treated inequitably in overbroad classes. And, because of the difficulty in analyzing several sets of competing state laws, courts certifying multistate class actions often gloss over state law differences in order to approve a settlement. As former U.S. Solicitor General Walter E. Dellinger III testified to Congress: "Many state courts faced with interstate class actions, however, have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles."

The academic literature is flush with critiques of judicial scrutiny of adequacy and fairness in the class context. As Professor Wooley states, ***"The literature indicates that courts all too often have had little***

ability or incentive to insure that absent class members are treated fairly." Wooley, 79 TEX. L.R. at 412 (citing six law review articles in support). Professor Klement has elaborated on the inadequacy of courts as monitors of class action abuse:

> ***Constrained by the institutional requirements of neutrality and passivity set by the adversary system on the one hand, and lacking sufficient adversity between the defendant and the class attorney whenever attorney fees and proposed settlements are concerned on the other, courts have been left, by and large, uninformed about the parameters necessary to effectively regulate class attorneys. Taking into account their constrained resources and overburdened dockets, it is not surprising that courts have failed to adequately monitor class actions.***

Klement, *supra*, 21 REV. LITIG. at 45.

Indeed, in reviewing class settlements, Courts are often presented with the sweetheart's dance between the united settlement proponents of class counsel and defendant, *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (noting that settlement proponents **"may *even put one over on the court, in a staged performance*"**). While Plaintiff's counsel has the incentive of an immediate payday, class action Defendants have an incentive to embrace such settlements as a means to limit their liability.[2]

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[2] Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, Wall St. J., July 18, 1996 at A1

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Both courts and academic scholars have sounded the alarm with respect to these problems.[3] Indeed, class action abuse has become sufficiently recognized that certain mainstream media have heralded the issue, including the fact that judicial review has proven inadequate to stem the tide.[4]

Amici have summarized the problem of class abuse for a very significant reason: to remind the Court that *direct*

(noting an emerging trend for corporate defendants to embrace the class action settlement as a means to limit its liability). Additionally, in certain cases potential objectors have been bought out in order to avoid an objection or an appeal.

[3] *See, e.g., Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring) (***"Plaintiffs' attorneys are increasingly filing nationwide class actions in various state courts. . . . [M]ost of these cases in actuality will be disposed of through "coupon" or "paper" settlements."***); Susan P. Koniak and George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1056 (1996) ("We agree with those who argue that lawyer abuse in class actions is rampant and that the current system, far from keeping this abuse in check, is set up to shield lawyers from the consequences of their misdeeds."); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 43-44 (2002); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L.R. 1343, 1348 (1995) ("If not actually collusive, non-adversarial settlements have all too frequently advanced only the interests of plaintiffs' attorneys, not those of the class members").

[4] *See, e.g.*, Pamela Sherrid, *Class Action Crumbs*, U.S. News & World Rep., Mar. 25, 2002, at 24 ("this tale illustrates the failings of the nation's legal system in protecting the interests of society's most vulnerable: the little guy"); Joe Stephens, *Coupons Create Cash for Lawyers; Class Action "Paper" Settlements Mean Little to Individual Plaintiffs*, Wash. Post, Nov. 14, 1999, at A1 (noting many examples of court approval of settlements that provided only coupon relief to class members); Barry Meier, *Plaintiffs in Business Cases Challenge Group Justice*, N.Y. Times, Feb. 18, 1997 (discussing class action in which one class member paid $91 in legal fees for a recovery of $2).

review of adequacy of representation, as required by Federal Rule 23 and its state counterparts, has all too often failed to ensure that absent class members receive due process. In light of these failures and the need to preserve a mechanism by which *amici*'s citizenry will not be unfairly bound by such settlements, *amici* now turn to the legal reasons why this Court must preserve the right of courts to review a rendering court's assessment of adequacy of representation.

II. Due Process Guarantees the Right of Collateral Review of Adequacy of Representation.

The right of collateral review of adequate representation is essential to due process, and has historically been considered a central aspect of the class action procedure. ***See 18 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 4455, at 452 (Supp. 2000) ("It has long been the general understanding . . . that only adequate representation can justify preclusion against nonparticipating class members."); MOORE'S FEDERAL PRACTICE § 130.07[3] (3d ed. 1997) ("If the class did not receive adequate representation in the court rendering the class action judgment, that issue may be raised on collateral attack."); Advisory Committee Notes to Federal Rule 23 (1966)*** ("subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action.") ***As discussed below, this general view emerged both because of this Court's black-letter pronouncements regarding the constitutional requirements for giving preclusive effect to judgments, and because the conduct of a due process***

balancing inquiry significantly weighs toward the availability of collateral review.

A. Established principles of *res judicata* and full faith and credit permit collateral review of adequacy of representation.

In the context of applying the doctrines of full faith and credit and *res judicata*, this Court has consistently held that judgments will only be entitled to preclusive effect when the court entering those judgments both had proper jurisdiction and provided full due process to the litigants. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) (judgment entered by court lacking personal jurisdiction is void); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 (1982) ("If [the rendering] court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given"); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) (noting that the rendering court must have provided procedural due process in order for judgment to have preclusive effect).

Petitioners respond to this due process requirement by pointing both to the certifying court's initial determination that the entire class was adequately represented, and to Respondents' (alleged) opportunity to object to adequate representation at the time of that initial review.[5] But this

[5] *Amici* observe here that the notice provided to Messrs. Stephenson and Isaacson in the Agent Orange class proceedings fell well short of due process requirements, as the class was expanded after the close of the opt out period from those who were "injured" by exposure to Agent Orange to those, like Respondents, who "had not yet manifested

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response is unavailing, given that absentees collaterally challenging adequacy have neither presented specific objections at the time of class certification, nor were they legally required to do so.

In *Martin v. Wilks*, 490 U.S. 755 (1989), this Court reaffirmed that even individuals who have received notice and a fair opportunity to be heard may collaterally attack adequacy if they were not *required* to appear and lodge their objections in the original proceeding. In *Martin*, a group of white firefighters filed a reverse discrimination lawsuit premised on the alleged illegality of hiring quotas that were implemented under a consent decree in an earlier case. Although the white firefighters were not named parties in the first case, they had received notice of the proceeding and had an opportunity to intervene to contest the consent decrees. 490 U.S. at 759-60. The trial court dismissed the claims as "impermissible collateral attacks" on the consent decree, and the Eleventh Circuit reversed. *Id.* at 760-61. This Court affirmed the Eleventh Circuit, holding that, because the white firefighters were not legally required to intervene to contest the original consent decree, they must be permitted an opportunity to raise a collateral challenge to the effect of that decree. ***"Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to***

injury." Thus, at the time of the original certification decision, no notice had been sent that indicated that people, such as Respondents, were included within the proposed class. Obviously, Respondents could not have objected to adequacy at the time of certification without having received constitutionally-adequate notice.

the jurisdiction of the court and bound by a judgment or decree." 490 U.S. at 765.

The holding in *Martin v. Wilks* is consistent with this Court's long-standing personal jurisdiction jurisprudence, which permits defendant to attack default judgments collaterally on the basis that the rendering court lacked jurisdiction over them, even when those defendants received actual notice of the original suit but failed to appear. *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931); Charles A. Wright & Arthur Miller, 18A FEDERAL PRACTICE & PROCEDURE § 4430 at *47222 (2002) ("The Baldwin opinion repeated the persisting rule that a defendant who makes no appearance whatever remains free to challenge a default judgment for want of personal jurisdiction").

Just as individuals are not required to intervene in actions affecting their rights, even when they have notice and an opportunity to do so, absent class members are not required by Rule 23 to present their objections to adequate representation before the certifying court. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) ***("an absent class action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection").***[6] Because

[6] The *amicus* Products Liability Advisory Council ("PLAC") argues that this language from the *Shutts* opinion cannot mean what it says. *See* PLAC Br. at 13. Apart from the fact that the language leads to a result PLAC does not support, PLAC's brief offers no explanation as to why the Court in *Shutts* did not mean that absent class members have no obligation to appear at the class certification hearing.

absent class members are not required to assert their objections to adequacy of representation before the original certifying court, they *must* constitutionally be entitled to do so in the context of an individual lawsuit in which the defendant raises a *res judicata* defense. *See* Patrick Wooley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L.R. 383, 403 (2000) [hereinafter "Wooley"] ("*Martin* and Rule 23 together make clear that under federal law class members cannot forfeit their rights to adequate representation by failing to object to inadequate representation in the class proceedings themselves").

Petitioners will likely attempt to distinguish *Martin* and cases involving default judgments on the basis that, under Rule 23, courts have an obligation to assure that absent class members have received adequate representation. *See* Pet. Br. at 27 (maintaining that adequacy is assured by the certifying court's Rule 23(a)(4) inquiry); *see also* PLAC Br. at 13 ("the absent class members are justified in relying on the certifying court, and the defendant opposing class certification, to protect their interests"). However, this assumes that the certification decision will always be correctly made and that absent class members can uniformly rely upon class representatives to evaluate their own adequacy when making their presentation to the court. As the next section will demonstrate, a certifying court's review of adequacy, in the absence of adversarial presentation by those affected, is insufficient to justify elimination of an absent class members' right to a day in court.

B. The protection afforded absent class members by continuing to afford the opportunity of collateral review of adequacy outweighs any contravening interest in eliminating such a review.

Contrary to Petitioners' contentions, when one balances the competing interests at stake with respect to permitting collateral review of adequacy, the balance strongly favors the availability of the procedure.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court established the basic test for determining how much process is due to protect a property interest. The Court must consider the nature and significance of the private interests at stake, the risk of error and the probable value of additional safeguards, and the competing interests of the public and other affected parties. 424 U.S. at 334; *Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991). Below, *amici* explore each of these factors in the context of collateral review of adequacy of representation if applied to absentees in representative litigation.

1. The interests at stake are significant. Petitioners acknowledge, as they must, that "Respondents' interest in adequate class representation . . . is important." Pet. Br. at 34. However, unwilling to grant that any part of a balancing test favors Respondents, Petitioners then go on to conflate the magnitude of the interests at stake with the risk of erroneous deprivation of that interest. *See* Pet. Br. at 34-35 (arguing that Respondents' interests were adequately protected by the certifying court's conclusion regarding the fairness of the settlement, its review of adequacy, and Rule 23's provision of the right to opt out). This will not wash.

Messrs. Stephenson and Isaacson both allege that they developed rare, life-threatening cancers as a result of Petitioners' wrongful conduct. Obviously, the nature of these plaintiffs' property interests in their claims is highly significant, whatever the protections allegedly afforded to protect those interests. This Court should not permit Petitioners to underplay the magnitude of the private interest of adjudicating responsibility for life-threatening cancers by pointing to procedures that Petitioners claim were in place for class representatives to present those interests. In any event, as described below, the procedures that Petitioners ballyhoo are not in any way sufficient to tip the scales their way.

2. Collateral review of adequacy of representation substantially reduces an otherwise significant likelihood that absent class members will be erroneously deprived of their rights. The risk that absent class members will be erroneously deprived of their rights in a class proceeding is unacceptably high in the absence of a double-check on the certifying court's determination of adequacy and willingness to thoroughly monitor that adequacy throughout the course of the litigation.

As set forth in detail in Part I above, the ugly, documented facts demonstrate that existing class action practice is subject to considerable abuses that manage to survive judicial scrutiny under Rule 23 and its state law counterparts. With their repeated invocations of Rule 23's certification requirements as the be-all-and-end-all of due process, Petitioners pound their fists on reality in the hopes that it might break. As starkly illustrated by the specific facts in Messrs. Stephenson's and Isaacson's cases, an initial Rule 23 inquiry, even if conducted in utmost good faith by a court assessing certification, may be

insufficient to protect absentees' rights. This is especially so because the certifying court expressly considers adequacy only at the certification stage, and, in many instances, inadequacy in representation occurs much later. *See, e.g., Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) ("A court must view the representative's conduct of the entire litigation with this [adequacy of representation] criterion as its guidepost.").

Contrary to Petitioners' position that "there is [no] reason to believe that allowing *re*litigation of the issue would add much value in protecting against error," Pet. Br. at 36, a court reviewing adequacy on a collateral basis has a significant institutional advantage over the original certifying court. First, a court conducting a collateral review has the benefit of knowing how subsequent events have impacted the class representation, consistent with *Shutts*' requirement that adequacy be provided *"at all times,"* 472 U.S. at 812 (emphasis added). Second, as Professor Wooley explains, relying on a judicial officer to assess the truth in the absence of adversarial presentation is altogether inconsistent with our Anglo-American tradition of due process:

> ***Reliance on the special role of the court for this purpose [of binding absentees] would be inconsistent with foundational norms of American jurisprudence. Put another way, the principle that issues in a case are best resolved by reliance on adversarial presentation to a judge – rather than reliance on investigation by the judge – is embedded in the American conception of due process.***

Wooley, 79 TEX. L.R. at 411.

Perhaps the most outrageous risk of erroneous deprivation in the class action context occurs when, as in this case, the original court purports to resolve the "future" claims of individuals. By definition, at the time of such certification a court cannot know most of the relevant facts that dictate whether a class settlement is fair and whether an absentee has received adequate representation if that absent class member's claim has not yet arisen. No one knows what factual and legal circumstances might exist at the time such a future claim eventually accrues. Thus, courts assessing adequacy and fairness in the context of settlements purporting to resolve future claims must, implicitly or explicitly, make predictions about an unknown future. They must estimate the rate of future incidence of injury among class members, the likely period of time that such injuries will continue to occur, and the future value of any claims once the class members become ill. The uncertainties inherent in such predictions render any assessment of adequacy at the time of certification incredibly suspect.

In this case, of course, at the time of certification Judge Weinstein had little evidence to support class members' claims that Agent Orange causes disease, and that absence of evidence strongly colored his views of adequacy of representation. Now, subsequent to the conclusions of the National Academy of Sciences, which has related Agent Orange to certain cancers, including those of Respondents, the scientific evidence in support of causation is much stronger. JA 319-325. Moreover, absent class members, including Stephenson and Isaacson themselves, continue to assert credible claims of Agent Orange-related injuries years after the class settlement funds have been exhausted. Thus, the Agent Orange settlement

provides a harsh example of the risk of erroneous deprivation coming to fruition.

3. The States' public interest in preserving their citizens' rights to bring claims when they accrue favors collateral review. *Virtually every state law provides that a claim for specific disease does not accrue until that disease becomes manifest. These laws delay consideration of future claims precisely because the uncertainties surrounding such claims make them impossible to adjudicate before their accrual. Only in a class (or bankruptcy) setting have there been attempts to abridge the state substantive right of individual litigants to have their injury claims adjudicated after they accrue. Allowing unripe claims to be released by representatives, and especially when those representatives are present claimants with different motivations to settle, enhances the need for protection of those rights. Only the continued availability of collateral review of due process for such absent class members, including a review of notice and adequacy of representation, in many instances will allow future claimants to be heard at all. Preservation of the right to have due process reviewed collaterally will protect amici*'s citizens from those who attempt to abuse the class action device by settling claims which our states have intentionally preserved for another day. This federalism interest, although ignored by Petitioners, is of great significance.

4. Any contravening interest in finality does not outweigh class members' rights to a day in court. This Court has never valued efficiency over justice, and it should not do so in this context. Class action practice has proceeded apace in a world where collateral attacks have traditionally been permitted, and this case provides no reason to believe that a reaffirmation of that

tradition by this Court will upset that ongoing practice. Whether collateral challenges are brought by a few class members, or by a few thousand, the administrative burdens on the courts and altered expectations of defendants are a small price to pay to ensure that litigants are not stripped of their rights without representation.

CONCLUSION

For all the foregoing reasons, *amici* respectfully pray this Court affirm the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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